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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 435

DART DRUG CORPORATION OF MARYLAND, and PEOPLES SERVICE DRUG STORES, INC.,

Appellants,

v.

ELLIS GADOL and SELMA GADOL, co-partners doing business as FOUR CORNERS PHARMACY,

Appellees.

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

This is an appeal from a judgment of the Court of Appeals of Maryland, reversing a decision of the Maryland Circuit Court for Montgomery County and directing the issuance of a permanent injunction against the appellants under the Maryland Fair Trade Act.

OPINIONS BELOW

The Opinion of the Court of Appeals, rendered on May 13, 1960, is reported at 161 A. 2d 122. That decision and the Opinion and Order of the Maryland Circuit Court for Montgomery County are printed as Appendix A hereto (*infra*, p. 1a).

JURISDICTION

Appellees instituted this suit on July 17, 1958, in the Circuit Court of Montgomery County, Maryland, pursuant to the Fair Trade Act of Maryland, Article 83 §§ 102-110 of the 1957 Code of Laws of Maryland, to enjoin appellants from selling pharmaceutical products at less than the minimum retail resale prices stipulated by four manufacturers, none of whom were party to the suit. The judgment of the Court of Appeals of Maryland reversing the decision of the Circuit Court for Montgomery County and granting the requested injunction, was entered on May 13, 1960, and its order denying appellants' Motion for Reargument was filed on June 29, 1960. Appellants' Notice of Appeal was filed with the Clerk of the Court of Appeals of Maryland on July 26, 1960. The jurisdiction of this court to review the judgment below is conferred by Title 28, U.S. Code, § 1257(2). This jurisdiction is believed to be sustained by *Winters* v. *New York*, 333 U.S. 507 and *Prudential Insurance Co.* v. *Benjamin*, 328 U.S. 408.

STATUTES INVOLVED

This appeal involves the constitutionality of "the non-signer clause" of the Maryland Fair Trade Act, Article 83, § 107 of the 1957 Code of Laws of Maryland, and Section 5 of the Federal Trade Commission Act as amended, 15 U.S.C. § 45, Act of July 14, 1952, c. 745, 66 Stat. 632, known as the McGuire Act. The text of both laws is set out in Appendix B hereto.

QUESTIONS PRESENTED

1. Is the loss of business by a non-signing retailer as the result of price cutting by a competing non-signing retailer in violation of minimum prices fixed by manufacturers under authority of a state Fair Trade Act and the McGuire Amendment to the federal antitrust laws, actionable damage within the meaning of those statutes?

2. Where the highest court of a state construes a state Fair Trade Act so as to give such a retailer the right to protection against such price cutting by his competitor whether or not the manufacturer chooses to bring suit, does it not constitute a violation of the Fourteenth Amendment to the Constitution of the United States?

STATEMENT OF THE CASE

This is an action brought by appellees, the proprietors of a retail drug store in Silver Spring, Maryland (hereinafter referred to as plaintiff) to enjoin the appellants, two competing retail drug stores in the same vicinity (hereinafter referred to as defendants) from selling branded products at less than the minimum retail resale prices established by four manufacturers of drug and cosmetic products under the Maryland Fair Trade Act (*infra*, p. 18a). That Act authorizes manufacturers of branded merchandise to establish minimum resale prices for such merchandise by contracts with one or more customers and to make such resale prices binding on all customers, whether or not they are parties to such contract. None of the parties to this case signed such a contract.

The manufacturers of the articles whose sale was enjoined by the court below, were Miles Laboratories, Inc., Bristol-Meyers Co., Mead-Johnson Co., and Johnson & Johnson. None of them joined in this action and none of them brought an independent action to enjoin the alleged violations of the minimum prices in question.

The defendants admitted the advertising and sale of the products in question at prices below the minimum retail resale prices set by the manufacturers, but they maintained that the plaintiff had no standing to bring this action for two principal reasons: (1) The manufacturers themselves had failed diligently to enforce their rights under the statute; and (2) the plaintiff as a retailer in

competition with the defendants, had no right to enjoin the alleged price cutting by the defendants.

The defense that the construction of the Maryland Fair Trade Act sought by the plaintiff and made by the court below, conflicts with the Fourteenth Amendment to the United States Constitution was interposed by paragraph 20 of the Answer of defendant Dart (R. 23) and paragraph 17 of the Answer of defendant Peoples (R. 19) to the plaintiff's Complaint in the Circuit Court.

The evidence adduced at the trial showed that the manufacturers of the articles in question had been "passive and indifferent" toward enforcement of their minimum retail prices in this area (p. 14a) and that it was only because of the manufacturers' failure to do anything about such price cutting that the plaintiff retailer brought this suit. The trial court held that if these four manufacturers had acted with reasonable diligence, they would have brought this suit themselves and the plaintiff non-signing retailer would have had no need to do so. It therefore denied plaintiff's prayer for an injunction and it dissolved the interlocutory injunction which it had previously granted.

On appeal, the Court of Appeals agreed with the Circuit Court that these manufacturers "were certainly not over-zealous in policing prices in the Washington-suburban area" and that the Gadols "brought this suit themselves because the manufacturers would not bring suit" (p. 8a); but it held that Article 83, § 107 of the Maryland Fair Trade Act created a cause of action for the protection of a competing retailer from price cutting of this sort whether or not the manufacturer or manufacturers involved chose to sue. It therefore reversed the decision of the trial court and remanded the case for the issuance of the permanent injunction sought by the plaintiff against its conipetitors.

On June 10, 1960, both defendants filed Motions for Reargument which reiterated their defense that as applied

by the Court of Appeals, the Fair Trade Act violated the Fourteenth Amendment (R. 272A and R. 283). On June 29, 1960, the Court of Appeals denied these Motions, but it granted a stay of its mandate to permit the defendants to apply to this court for review of its decision.

THE FEDERAL QUESTIONS PRESENTED BY THIS APPEAL ARE SUBSTANTIAL

In the twenty-five years since this court first upheld the validity of state Fair Trade legislation, this is the first time, we believe, that it has been called upon to decide whether a state, consistent with the federal antitrust laws and the Constitution of the United States, can confer upon a non-signing retailer the power to police his competitors' adherence to so-called Fair Trade prices established pursuant to state legislation authorized by Congress in the McGuire Act. While it is clear that Congress intended in that Act to subject non-signing retailers to the obligations imposed by state Fair Trade laws, nothing in the Act suggests that it intended to create a cause of action to protect such retailers.

1. The loss of business by a non-signing retailer as the result of price cutting by a competing retailer in violation of minimum prices established under authority of the Maryland Fair Trade Act and the McGuire Act is not actionable damage within the meaning of those statutes.

a. The Fair Trade Act.

The mere fact that such a retailer has lost business as the result of his competitior's statutory violation does not in itself mean that he has sustained legal injury of a kind that would entitle him to judicial relief. It is well settled that a person claiming damages as the result of the statutory violation of another is not entitled to recover unless he can show that he belongs to the particular class for whose protection the statute was enacted and that the injury sustained is of a kind that the statute was de-

signed to prevent.[1] Whether a competing retailer is a "person damaged thereby"[2] within the meaning of the Fair Trade Act and the McGuire Act depends upon "the mischief to be corrected and the end to be attained" by that statute.[3]

We submit that such a competing non-signing retailer is not a member of the particular class for whose protection this legislation was enacted and that his loss of business due to price cutting is not the kind of injury that this statute was designed to prevent. The judicially recognized purpose of Fair Trade legislation is to protect a manufacturer or supplier from injury to the good will inherent in his trade mark or brand name, not to protect a competitor from loss of business due to price competition. This has been the rationale on which state Fair Trade Acts have been sustained since this court's decision in *Old Dearborn* v. *Seagram Distillers Corp.*, 299 U.S. 183.[4] In that case, this court held that "the essence of the statutory violation consists not in the bare disposition of the commodity, but in a forbidden use of the trade mark, brand, or name in accomplishing such disposition." 299 U.S. 183, 193. The statute was upheld because:

> "The primary aim of the law is to protect the property—namely the good will—of the producer, which he still owns. The price restriction is adopted as an appropriate means to that perfectly legitimate end and not as an end in itself." *Ibid.*

In concluding its opinion, the court held that it did not have to consider the constitutional doubts that would have

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[1] *Cf. St. Louis R. Co.* v. *Conarty*, 238 U.S. 243, *Texas & Pac. R. Co.* v. *Rigsby*, 241 U.S. 33, *Peigh* v. *B. & O. R. Co.*, 204 F. 2d 391 (D.C. Cir., 1953).

[2] Article 83, § 107 Maryland Code, (*infra*, p. 21a), 15 U.S.C. § 45(a)(3), (*infra*, p. 22a).

[3] *N.L.R.B.* v. *Hearst Publications*, 322 U.S. 111, 124, *South Chicago Coal & Dock Co.* v. *Bassett*, 309 U.S. 251, 259.

[4] See also *Pep Boys* v. *Pyroil Sales Co.*, 299 U.S. 198.

been raised if the statute were construed as price fixing legislation since "the sole purpose of the present law is to afford a legitimate remedy for an injury to the good will which results from the use of trade marks, brands, or names . . ." 299 U.S. 183, 198.

The non-signer clause of the Maryland statute involved in this case is identical to that construed by this court in *Old Dearborn*. It provides that a violation of the Act is "unfair competition and is actionable at the suit of any person damaged thereby." In sustaining the constitutionality of that statute, the Maryland Court of Appeals held that it was the "assault upon the good will" that constitutes "what the statute denominates as unfair competition." *Schill* v. *Remington Putnam Book Co.*, 179 Md. 83, 90, 17 A. 2d 175, 179 (1941). See also *Bissell Carpet Sweeper Co.* v. *Masters*, 240 F. 2d 684, 687 (4th Cir., 1957).[5]

It may be true that retailer groups were primarily instrumental in obtaining the enactment of Fair Trade laws and that the retailer in his own mind regards himself as the beneficiary of such legislation. Nevertheless, under the theory on which the constitutionality of this legislation was sustained, the class which these laws are designed to protect is the owner of the good will in the trade name, and the evil aimed at is injury to that good will. Under these decisions, such damage as a non-signing retailer suffers by virtue of his competitor's price cutting is *damnum absque injuria*.[6]

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[5] In *Bissell Carpet Sweeper Co.* v. *Masters*, *supra*, the Court of Appeals for the Fourth Circuit held that the Maryland Fair Trade Act must be construed strictly because it was in derogation of the Maryland common law principle that a person has the right to sell his property at any price that he and the purchaser may agree on and that the courts should not infer that the legislature intended to change the common law principle beyond what the Act explicitly provides.

[6] *Cf. Alabama Power Co.* v. *Ickes*, 302 U.S. 464, 479, *Tennessee Power Co.* v. *T.V.A.*, 306 U. S. 118, 140.

b. The McGuire Act.

In enacting the enabling legislation of the Miller-Tydings and McGuire Acts, Congress was fully cognizant of this court's decision in *Old Dearborn*, upholding state Fair Trade laws as measures designed to protect good will, and it was for this purpose that the exemption was carved out of the federal antitrust laws. Yet if the decision below remains uncorrected, the inefficient retailer's patronage will replace the producer's good will as the interest to be protected. Such a fundamental change in the policy of the federal antitrust exemption should not be allowed to develop as the result of state court decisions without review by this court.

The court below observed that enforcement-wise, suits by competing retailers are more effective than suits by manufacturers because retailer action "makes it possible to deal in one case with the Fair Trade products of a number of manufacturers." (p. 8a). But whatever economies in disposing of Fair Trade litigation might be effected by this kind of across-the-board dragnet action, this is clearly not the kind of enforcement Congress intended to exempt in the McGuire Act. In *United States* v. *McKesson and Robbins*, 351 U.S. 305, this court held that in the McGuire Act "Congress has marked the limitations beyond which price fixing cannot go," and that the courts "are not only bound by those limitations, but we are bound to construe them strictly since resale price maintenance is a privilege restrictive of a free economy." 351 U.S. 305, 316. *Cf. United States* v. *Masonite*, 316 U.S. 265, 280, *Bissell Carpet Sweeper Co.* v. *Masters, supra*. The mere fact that it would expedite the disposition of Fair Trade litigation to give a non-signing retailer the right to enjoin in a single action, violations of the resale prices of many manufacturers does not permit a state court to exceed those limits.[7]

[7] In discussing the greater efficiencies inherent in retailer enforcement of Fair Trade prices as opposed to the traditional manufacturer's suit, the court below noted that there might be

We submit that the McGuire Act was enacted to permit enforcement of prescribed Fair Trade prices *against* non-signing retailers; not *by* such non-signers. The purpose of extending its requirements to such non-signers was to strengthen the underlying purpose of the Act and the remedy which it provided, *i.e.*, to enable manufacturers and suppliers better to protect the good will in their trade marks or brand names. The Act was not intended to create an entirely new cause of action in a competing retailer for protection from horizontal price competition, a kind of loss which Congress expressly refused to exempt. Congress has been careful to exempt from the antitrust laws only vertical price fixing authorized by agreement between a supplier and his customer. It has expressly excluded from the McGuire exemption, horizontal agreements fixing prices between persons in competition with each other on the same level of trade. 15 U.S.C. § 45(a)(5).

Every attempt to use the Miller-Tydings Act or the McGuire Act as a cloak for horizontal price fixing has been struck down by this court whenever such subterfuge has been brought to its attention. *McKesson and Robbins* v. *United States*, *supra*; *Schwegmann Brothers* v. *Calvert Distillers*, 341 U.S. 384. See also *Melrose Distillers* v. *United States*, 258 F. 2d 726, 730 (4th Cir., 1958) affirmed 359 U.S. 271, *Schill* v. *Remington Putnam Book Co.*, 182 Md. 153, 31 A. 2d 467. This court cannot let stand without review, a construction of state Fair Trade legislation which

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"difficulties" if manufacturers joined in the retailer's suit (p. 9a), citing 69 Harvard L. R. 316. Although the court did not explain the nature of these difficulties in its opinion, the cited article points out that "allowing a manufacturer to aid in obtaining an injunction against price cutting on products of competing manufacturers appears somewhat analogous in effect to horizontal price fixing which is proscribed by the McGuire Act." Note: The Operation of Fair Trade Programs, 69 Harvard L. R. 316, 343. The court below was apparently indifferent, however, to the horizontal price fixing inherent in allowing a retailer to police his competitor's prices.

makes such far-reaching inroads upon federal antitrust policy.

2. In construing the Fair Trade Act so as to give a non-signing retailer the right to protection from such price cutting by his competitor, whether or not the manufacturer chooses to bring suit, the decision below raises a new question as to the constitutionality of Fair Trade legislation.

The second *Schwegmann* case[8] sustained the constitutionality of Fair Trade under the McGuire Act as enforced by the manufacturer because neither the District Court nor the Court of Appeals would repudiate the premise of the *Old Dearborn* case, *supra* p. 6, that the manufacturer's interest in the good will of his product justified his controlling the price at which it was resold.

The District Court in that case conceded "that if we were to assume that the merchandise in question was fully owned by the defendants without any residual right inhering in the plaintiff" [manufacturer], the Fair Trade Act would clearly be unconstitutional as a "delegation to private persons of the uncontrolled and unappealable right to fix the prices of merchandise owned by another . . ." *Eli Lilly & Co.* v. *Schwegmann*, 109 F. Supp. 269, 271. The District Judge held, however, that on the record in this case, he could not make such an assumption in view of this court's decision in the *Old Dearborn* case.[9]

The Court of Appeals in second *Schwegmann* affirmed the District Court's decision, refusing to hold the Act uncon-

[8] *Schwegmann Brothers* v. *Eli Lilly & Co.*, 205 F. 2d 788 (5th Cir., 1953), affirming 109 F. Supp. 269 (E.D. La., 1953).

[9] But *n. b.* the District Court's suggestion that "after twenty years of experience under state Fair Trade Acts, the Supreme Court may conclude that the purpose of these Acts is not to protect the good will of a manufacturer, and that price fixing under these acts is not an appropriate means to that perfectly legitimate end, but is in fact an end in itself." 109 F. Supp. 269, 271. See also Dissenting Opinion of Judge Holmes in the Court of Appeals, 205 F. 2d 788, 793.

stitutional as it was there applied. The Fifth Circuit noted the appellant's objection that "Fair Trade laws could not constitutionally require non-signers to observe minimum prices without the participation of the trade-mark or brand owner;" but it refused to consider the point because it was "addressed to a hypothetical case." 205 F. 2d 788, 792. It held that the decision of that question should await the clarification and construction of the statute by the state courts.[10] This court in denying certiorari, presumably agreed that *Schwegmann* v. *Lilly* was not the case in which to decide this constitutional objection, 346 U.S. 856.

The issue is no longer hypothetical, however. It is raised by this appeal. The rationale of *Old Dearborn* clearly does not fit the facts of this case. Here the manufacturers and owners of the good will in the subject of the allegedly unlawful sale refused to bring suit. The plaintiff here, a non-signing retailer, had no conceivable interest in the property sold by the defendants and no legitimate interest in policing the price which his competitors charged for that property. As here applied and enforced, the Fair Trade Act does not merely authorize a manufacturer to set the price for his own property (or any rights in that property) after it leaves his hands. As the statute was construed below, the legislature has delegated the power to fix the price which a competing retailer, with no interest whatever in the property, can compel the owner to maintain.

Unlike the legislation sustained in *Nebbia* v. *New York* and the decisions following therefrom,[11] such a delegation of legislative power is not subject to any procedural safeguard or any standard of fairness or reasonableness. This case therefore presents a clear question of depriva-

[10] *Nebbia* v. *New York*, 291 U.S. 502. *Cf. Olsen* v. *Nebraska*, 313 U.S. 236 and *Yakus* v. *United States*, 321 U.S. 414.

[11] See Comment, Fair Trade and Horizontal Price Fixing: Their Status Since *Second Schwegmann Case*, 63 Yale L. J. 538, 543.

tion of a retailer's rights to his own property without due process. *State of Washington* v. *Roberge*, 278 U.S. 116, 122, *Eubank* v. *Richmond*, 226 U.S. 137, 143, *Schechter Poultry Corp.* v. *United States*, 295 U.S. 495. As stated by this court: "This is legislative delegation in its most obnoxious form; . . . since in the very nature of things, one person may not be entrusted with the power to regulate the business of another, and *especially of a competitor*. And a statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property." *Carter* v. *Carter Coal Co.*, 298 U.S. 238, 311. (Emphais supplied).

CONCLUSION

In terms of both its legal and its economic implications, the constitutionality of retailer enforcement of Fair Trade legislation is one of the major unresolved issues before the courts. We submit that this court should take the opportunity presented by this new application of the Maryland Act, for deciding the issue now and preventing the error below from being compounded in future decisions of state and federal courts. For the foregoing reasons, probable jurisdiction should be noted and the case should be set down for argument.

Respectfully submitted,

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